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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL., RESPONDENTS

On Writ of Certiorari
To The United States Court of Appeals
For The Sixth Circuit

BRIEF FOR ATLANTIC RICHFIELD COMPANY AND NEWMONT MINING CORPORATION AS AMICI CURIAE SUPPORTING RESPONDENTS

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36 pp

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TABLE OF CONTENTS

Page

INTEREST OF THE AMICI CURIAE 1

THE *PINAL CREEK* LITIGATION 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. INTRODUCTION 6

II. THE SIXTH CIRCUIT'S DECISION IS SOUND 7

A. CERCLA Is Presumed Not To Nullify Well-Established Common Law Rules 7

B. Applying The Principle "Expressio Unius Est Exclusio Alterius," The Text Of CERCLA Shows That Congress Did Not Intend To Abrogate The Common Law Rule of Limited Shareholder Liability 10

III. THE UNITED STATES RELIES ON UNSUPPORTED AND ERRONEOUS ASSERTIONS ABOUT THE "TYPICAL" RELATIONSHIP BETWEEN A PARENT AND ITS SUBSIDIARY 16

IV. THE UNITED STATES CONFUSES DIRECT AND DERIVATIVE LIABILITY, AND USES EVIDENCE OF ONE TO SUPPORT THE OTHER 21

A. The United States Does Not Identify Sufficient Evidence Of Actual Operation Of The Facility By CPC To Prove Direct Liability 23

B. Direct Liability Of A Parent Must Be Based On A Showing That The Parent Independently Operated The Facility 25

CONCLUSION 27

TABLE OF AUTHORITIES

Cases — Page

Akzona Inc. v. E.I. du Pont de Nemours & Co.,
607 F. Supp. 227 (D. Del. 1984) 20

American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert,
94 F.3d 586 (9th Cir. 1996) 18, 19

Anderson v. Abbott,
321 U.S. 349 (1944) 16

Astoria Fed. Sav. & Loan Ass'n v. Solimino,
501 U.S. 104 (1991) 7, 10

Atherton v. FDIC,
117 S. Ct. 666 (1997) 7

Burnet v. Clark,
287 U.S. 410 (1932) 9

C M Corp. v. Oberer Dev. Co.,
631 F.2d 536 (7th Cir. 1980) 16

Craig v. Lake Asbestos of Quebec, Ltd.,
843 F.2d 145 (3d Cir. 1988) 18

Edwards Co. v. Monogram Indus., Inc.,
730 F.2d 977 (5th Cir. 1984) (en banc) 18, 19, 24

Esmark, Inc. v. N.L.R.B.,
887 F.2d 739 (7th Cir. 1989) 20

Fletcher v. Atex, Inc.,
68 F.3d 1451 (2d Cir. 1995) 18

Gibraltar Sav. v. LDBrinkman Corp.,
860 F.2d 1275 (5th Cir. 1988),
cert. denied, 490 U.S. 1091 (1989) 18

Group Life & Health Ins. Co. v. Royal Drug Co.,
440 U.S. 205 (1979) 7

Gustafson v. Alloyd Co.,
513 U.S. 561 (1995) 11

In re Silicone Gel Breast Implants Prods. Liab. Litig.,
837 F. Supp. 1128 (N.D. Ala. 1993) 20

Isbrandtsen Co. v. Johnson,
343 U.S. 779 (1952) 7-8, 14

Jacksonville Elec. Auth. v. Bernuth Corp.,
996 F.2d 1107 (11th Cir. 1993) 14

Jarecki v. G.D. Searle & Co.,
367 U.S. 303 (1961) 11

Joslyn Mfg. Co. v. T.L. James & Co.,
893 F.2d 80 (5th Cir. 1990)
cert. denied, 498 U.S. 1108 (1991). 13-14, 21

Keene Corp. v. United States,
508 U.S. 200 (1993) 13

Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.,
4 F.3d 1209 (3d Cir. 1993) 9, 14

Lusk v. Foxmeyer Health Corp.,
129 F.3d 773 (5th Cir. 1997) 17, 25, 26

McCarthy v. Azure,
22 F.3d 351 (1st Cir. 1994) 20

Milwaukee v. Illinois,
451 U.S. 304 (1981) 14

Mobil Oil Corp. v. Linear Films, Inc.,
718 F. Supp. 260 (D. Del. 1989) 9

Morris v. New York State Dept. of Tax. & Fin.,
623 N.E.2d 1157 (N.Y. 1993) 9

Moskal v. United States,
498 U.S. 103 (1990) 15

Norman v. Del Elia,
533 P.2d 537 (Ariz. 1975) 9

Pinal Creek Group, et al. v. Newmont Mining Corp., et al.,
926 F. Supp. 1400 (D. Ariz. 1996), *rev'd on other grounds*, 118 F.2d 1298 (9th Cir. 1977), *petition for cert. filed*, 66 U.S.L.W. 3364 (U.S. Nov. 10, 1997) (No. 97-795) 2-4

Radaszewski v. Telecom Corp.,
981 F.2d 305 (8th Cir. 1992),
cert. denied, 508 U.S. 908 (1993) 9

Rake v. Wade,
508 U.S. 464 (1993) 15

Russello v. United States,
464 U.S. 16 (1983) 13

Topp v. CompAir Inc.,
814 F.2d 830 (1st Cir. 1987) 18

United States v. Cordova Chem. Co. of Mich.,
113 F.3d 572 (6th Cir. 1997)
(en banc) 6, 9-10, 14, 19, 21, 22, 25-26

United States v. Fabe,
508 U.S. 491 (1993) 7, 15

United States v. Kayser-Roth Corp.,
910 F.2d 24 (1st Cir. 1990), *cert. denied*,
498 U.S. 1084 (1991) 14

United States v. Texas,
507 U.S. 529 (1993) 7, 10, 14

Wallis v. Pan Am. Petroleum Corp.,
384 U.S. 63 (1966) 7

Washington Mkt. Co. v. Hoffman,
101 U.S. 112 (1879) 15

Western Pac. R.R. Corp. v. Western Pac. R. Co.,
197 F.2d 994 (9th Cir. 1951),
cert. denied, 346 U.S. 910 (1953) 24

Williams v. McAllister Bros. Inc.,
534 F.2d 19 (2d Cir. 1976) 20

Statutes

42 U.S.C. § 9601, *et seq.* 1-2

42 U. S.C. § 9601(20)(A) 11

42 U.S.C. § 9601(20)(A)(i)-(iii) 10-12, 14, 15

42 U.S.C. § 9601(21) 10

42 U.S.C. § 9607(a) 6, 10, 11

42 U.S.C. § 9607(a)(1), (2) 20

Other Authorities

1 William M. Fletcher, Fletcher Cyclopedia
of the Law of Private Corporations
§ 41.10 (perm. ed. rev. vol. 1990) 21

Lynda J. Oswald, *Strict Liability of Individuals
Under CERCLA: A Normative Analysis*,
20 B.C. ENVT'L AFF. L. REV. 579 (1993) 8

P. Blumberg, The Law of Corporate Groups: Tort,
Contract, and Other Common Law Problems in the
Substantive Law of Parent and Subsidiary Corporations
§ 10.02 (1987) 18

Legislative History

126 Cong. Rec. S15006 (Nov. 24, 1980) 8

126 Cong. Rec. S14964 (Dec. 3, 1980) 8

126 Cong. Rec. S16427 (Dec. 12, 1980) 8

S. Rep. No. 96-848, at 31 (1980) 8

Hearing on H.R. 85 and H.R. 7020 Before the House Comm. on Ways and Means, 96th Cong. (June 2, 1980) 8

Court Rules

S. Ct. Rule 34.6 1

S. Ct. Rule 37(2)(a) 1

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BRIEF FOR ATLANTIC RICHFIELD COMPANY AND NEWMONT MINING CORPORATION AS AMICI CURIAE SUPPORTING RESPONDENTS

INTEREST OF THE AMICI CURIAE[1]

Atlantic Richfield Company ("ARCO") and Newmont Mining Corporation ("Newmont") are defendants in litigation brought under the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601, *et seq.*

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[1] Pursuant to Rule 34.6, amici state: (i) that no counsel for any party authored this brief in whole or in part; and (ii) that no persons or entities other than amici made a monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37(2)(a), letters from counsel for all parties consenting to the filing of this brief have been filed with the Clerk of the Court.

("CERCLA"). The case is *Pinal Creek Group, et al. v. Newmont Mining Corp., et al.*, No. CIV-91-1764-PHX-ROS (D. Ariz.) (the "*Pinal Creek*" case).[2] The plaintiffs in the case are not the United States or any state, but rather are current and former owners of copper mines in Arizona. These plaintiffs assert that their own former shareholders, ARCO and Newmont, should be held liable under CERCLA as "operators" based on their alleged control of the plaintiffs.

The Court's decision here probably will set the standard by which the operator issue in *Pinal Creek* will be resolved. Consequently, ARCO and Newmont have a critical interest in the outcome of this case.

THE *PINAL CREEK* LITIGATION

The *Pinal Creek* litigation arises from copper mining in the Pinal Creek Drainage Basin (the "Site") in eastern Arizona. Mining operations at the Site have resulted in groundwater pollution that must be cleaned up.

Plaintiffs in the case are Cyprus Miami Mining Corporation ("Cyprus"), BHP Copper Company, formerly known as Magma Copper Company ("Magma"), and Inspiration Consolidated Copper Company ("Inspiration"). For more than a decade, Cyprus and Magma have been mining and processing minerals at various facilities within the Site. Inspiration, Cyprus's immediate predecessor, owned and operated facilities within the Site for more than 70 years.

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[2] As of the date of this brief, a petition for certiorari in the *Pinal Creek* case was pending in this Court. *Pinal Creek Group, et al. v. Newmont Mining Corp., et al.*, No. 97-795 (petition filed Nov. 10, 1997).

ARCO's connection to the case stems from its acquisition of the Anaconda Company ("Anaconda"). From 1915 to 1978, Anaconda owned stock in Inspiration, one of the plaintiffs. While the number of outstanding shares of Inspiration stock fluctuated, Anaconda never owned more than 27.58 percent of Inspiration. ARCO is alleged to be the successor of Anaconda as the owner of this minority interest in Inspiration.

Newmont's connection to the case is that it is the former parent company of one of the plaintiffs. In 1983, a Newmont subsidiary, Pinto Valley Copper Company, acquired mining properties within the Site. In 1986, Pinto Valley was merged into Magma, another Newmont subsidiary. The combined company continued to own the mining properties as a Newmont subsidiary until 1987, when Magma was spun off as an independent company.

Faced with certain liability under CERCLA, plaintiffs began incurring costs to investigate contamination at the Site. In 1991, they brought the *Pinal Creek* case against ARCO, Newmont, and others, seeking to recover these costs from their former shareholders. Neither ARCO nor Newmont themselves ever owned or operated any mines at the Site. Instead, they are alleged to be liable because, as a former minority shareholder of one plaintiff (in the case of ARCO) and as a former parent of another plaintiff (in the case of Newmont), they allegedly "controlled" these two plaintiffs.

Based on the longstanding rule that a corporation cannot pierce its own veil, ARCO filed a motion to dismiss Inspiration's CERCLA claim. *See Pinal Creek Group v. Newmont Mining Corp.*, 926 F. Supp. 1400, 1414 (D. Ariz. 1996), *rev'd on other grounds*, 118 F.2d 1298 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3364 (U.S. Nov. 10, 1997) (No. 97-795). The district court refused to dismiss the claim, however, reasoning that ARCO can be held "directly" liable as

an operator because of Anaconda's involvement in the affairs of Inspiration. *Id.* The Court brushed aside the common law principle raised by ARCO with nothing more than the comment that CERCLA's provision for "owner or operator" liability "may occasionally conflict with state corporate law" but that this conflict is simply "unavoidable under the broad liability provisions of CERCLA." *Id.* at 1415. As a result, plaintiffs are proceeding on their claims against ARCO and Newmont based on the "control" theory.

SUMMARY OF ARGUMENT

As illustrated by the *Pinal Creek* case, the argument raised here by the United States is being used in litigation among private parties in unprecedented and pernicious ways. In *Pinal Creek*, the "control" theory is not being used by a government to reimburse its environmental response fund. Instead, the theory is being used by highly profitable mining companies in an attempt to shift all or part of their environmental response costs to certain of their former shareholders. The question is not whether the Site will be cleaned up, but rather which corporation(s) should pay.

Amici submit that the *en banc* decision of the Sixth Circuit was correct. Both the legislative history of CERCLA and the specific language of the statutory sections at issue here show that merely by using the word "operator," Congress did not intend to overrule more than a century of common law establishing that, absent a showing of the recognized grounds for piercing the corporate veil, shareholders are not liable for the actions of a corporation.

The brief of the United States – and the decision of the district court with which it agrees – rely on sweeping and unsupported statements about what is "normal" and "typical" in the relationship between a parent and a subsidiary. The

United States asserts without support in the record or in the law that CPC International, Inc. ("CPC") went beyond some undefined threshold of what the United States deems to be an appropriate level of involvement by a parent in the affairs of its subsidiary. Similar allegations have been made about amici in the *Pinal Creek* case as a purported justification for holding them liable for the acts of corporations in which they owned stock.

In this brief, amici address the misconceptions of the United States about the normal involvement of a parent or controlling shareholder in the affairs of a subsidiary. So long as corporate formalities are observed and the corporate form is not used to perpetrate a fraud, it is entirely appropriate for a parent or substantial shareholder to be closely involved in a corporation's affairs. The unwritten assumption underlying the arguments of the United States – that control is somehow wrongful or that it should lead to liability of the shareholder – is a startling departure from well-settled law. Amici therefore support the decision of the Sixth Circuit and oppose the United States' effort to punch a hole through the previously sturdy wall protecting shareholders from liability for the acts of the corporation.

The United States also confuses the two distinct theories on which operator liability of a parent corporation could be premised. The United States alternates between arguing (1) that the parent should be liable for the acts of the subsidiary based on the parent's control of the subsidiary's affairs (a *derivative* theory of liability) and (2) that the parent should be liable for its own actions in directly operating a facility (a *direct* theory of liability). The Sixth Circuit recognized that these two theories are distinct. As to derivative liability, the Sixth Circuit correctly held that a parent cannot be liable for the actions of its subsidiary unless grounds exist for piercing the corporate veil under state law. As to direct liability, the Sixth Circuit

correctly stated that the parent can be liable only if it "independently" operates the facility "in the stead of its subsidiary" or "actually operate[s] the facility alongside its subsidiary." 113 F.3d at 579.

ARGUMENT—

I. INTRODUCTION.

Under CERCLA, a past or present "owner or operator" of a hazardous waste facility is liable for cleanup costs paid by the government. 42 U.S.C. § 9607(a). The question presented by this case is whether a parent corporation becomes an "operator" under CERCLA by participating in and exerting some degree of control over the affairs of a subsidiary that owns such a facility. Pet. Br. at I. The answer hinges, in large measure, on whether Congress meant to sweep away traditional common law principles of limited shareholder liability merely by using the word "operator" in CERCLA.

ARCO and Newmont urge the Court to affirm the decision of the Sixth Circuit. The court's interpretation of CERCLA is sound, and it appropriately refused to nullify time-honored principles of common law without more indication that Congress intended to do so when it enacted CERCLA. *United States v. Cordova Chem. Co. of Mich.*, 113 F.3d 572, 579 (6th Cir. 1997) (en banc). The Sixth Circuit also refused to impose an amorphous standard of corporate shareholder liability because of the dangers inherent in such an approach. *Id.* at 580. Not the least of these concerns is the substitution of "the relatively bright line provided by the traditional doctrine of piercing the corporate veil with a nebulous 'control' test." *Id.*

The *Pinal Creek* case aptly demonstrates the dangers inherent in this slippery-slope approach. There, the plaintiffs

are private mining corporations that own and operate (and generate huge profits from) copper mines that produce hazardous wastes. Having admitted liability under CERCLA, these corporations are using a "control" theory to sue *their own former shareholders* for the cleanup costs at the site. Such a lawsuit would be forbidden by the common law, but it is precisely the type of litigation being generated by the "control" standard.

II. THE SIXTH CIRCUIT'S DECISION IS SOUND.

A. CERCLA Is Presumed Not To Nullify Well-Established Common Law Rules.

The starting point in this case, "'like the starting point in any case involving the meaning of a statute, is the language of the statute itself.'" *United States v. Fabe*, 508 U.S. 491, 500 (1993) (quoting *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 210 (1979)). When reviewing the text of a federal statute, a court must keep in mind that "Congress does not write upon a clean slate." *United States v. Texas*, 507 U.S. 529, 534 (1993) (citing *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)). Rather, "Congress acts against the background of the total *corpus juris* of the states." *Atherton v. FDIC*, 117 S. Ct. 666, 670 (1997) (ellipsis omitted) (quoting *Wallis v. Pan Am. Petroleum Corp.*, 384 U.S. 63, 68 (1966)). Because the common law exists as a backdrop to all congressional acts, and because Congress has limited constitutional powers, this Court presumes that a federal statute retains "'long-established and familiar principles'" of the common law. *United States v. Texas*, 507 U.S. at 534 (quoting *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)). This Court will not read an act of Congress as overcoming this presumption and abrogating the common law, unless the act "speak[s] directly" to the common-law principle and

congressional intent to override it is "evident." *Id.* (citations omitted).

Here, there is no evidence of any congressional intent to override the common law. On the contrary, the Senate sponsor of the bill stated: "It is intended that issues of liability not resolved by this act, if any, *shall be governed by traditional and evolving principles of common law.*" 126 Cong. Rec. S14964 (Dec. 3, 1980) (Statement of Sen. Randolph) (emphasis added). The legislative history of CERCLA is replete with references to adopting and following common law principles.[3]

The principle at issue here is a basic tenet of the common law. Limited liability of corporate shareholders is the "keystone" of American corporation law. Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVT'L AFF. L. REV. 579, 622-23 & n.156 (1993) (collecting authorities). To encourage business in the corporate form, every state has passed laws under which the

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[3] *E.g.*, 126 Cong. Rec. S15006 (Nov. 24, 1980) ("Under the bill, no obligations or liabilities of any person under other Federal or State law, including common law, are diminished by the provisions of this bill.") (Statement of Sen. Randolph, sponsor of the bill); 126 Cong. Rec. S16427 (Dec. 12, 1980) ("I want to make it clear that section 302 of H.R. 7020 [the CERCLA bill passed by the House] provides that nothing in the act affects or modifies in any way rights or liabilities under other State or Federal law, including common law.) (Statement of Sen. Randolph); S. Rep. No. 96-848, at 31 (1980) ("[CERCLA's] liability scheme essentially codifies the common law liability standard applicable in cases involving hazardous substances and materials."); Hearing on H.R. 85 and H.R. 7020 Before the House Comm. on Ways and Means, 96th Cong. (June 2, 1980) ("Well, in 7020, what we are doing, is clearly making the statutory law the same as the common law in certain states.") (Statement of Rep. Florio, sponsor of the bill).

"shareholders of the corporation, including, if there is one, its parent corporation, are not responsible" for injuries caused by the corporation. *Radaszewski v. Telecom Corp.*, 981 F.2d 305, 306 (8th Cir. 1992), *cert. denied*, 508 U.S. 908 (1993). Thus, "[a] corporation and its stockholders are generally to be treated as separate entities. Only under exceptional circumstances . . . can the difference be disregarded." *Burnet v. Clark*, 287 U.S. 410, 415 (1932).[4]

With these principles in mind, the Sixth Circuit carefully reviewed CERCLA's language and legislative history. Initially, the court found what many other courts have recognized: that many of its provisions are vague, its legislative history is sparse, and its "specific" as opposed to "general" goals are difficult to discern because the statute represents an eleventh-hour compromise. *Cordova*, 113 F.3d at 578. This point cannot be reasonably disputed; even courts that have eschewed the common law in this context readily acknowledge that CERCLA is "notorious for its lack of clarity and poor draftsmanship." *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221 (3d Cir. 1993). Upon reviewing the liability provisions in CERCLA, the Sixth Circuit found nothing in the statute that "warrants the invocation by courts of vague, expansive concepts . . . which threaten the efficacy of time-honored limited liability protections afforded by the corporate form." *Cordova*, 113 F.3d at 579. The Sixth

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[4] Piercing the corporate veil is difficult to accomplish and generally requires a showing that the corporation was the mere alter ego of the shareholder, that the shareholder disregarded the corporate form, *and* that the corporate form was used to perpetrate a fraud or injustice. *See, e.g.*, *Morris v. New York State Dept. of Tax. & Fin.*, 623 N.E.2d 1157, 1160-61 (N.Y. 1993); *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F. Supp. 260, 267 (D. Del. 1989) (Delaware law); *Norman v. Del Elia*, 533 P.2d 537, 539 (Ariz. 1975).

Circuit accordingly held that a parent corporation is liable under CERCLA, based upon the extent of its control and involvement in an offending subsidiary, "only when the requirements necessary to pierce the corporate veil are met." *Id.* at 580.

Unless there is sufficient evidence in CERCLA demonstrating that Congress did, in fact, intend to disrupt this fundamental principle of common law, the Sixth Circuit's decision must stand. *See United States v. Texas*, 507 U.S. at 534; *Astoria*, 501 U.S. at 108. Not only is such evidence lacking, the legislative history reveals the clear intent of Congress to preserve and incorporate common law principles. *See supra* n.3 & accompanying text. Moreover, as explained in the next point, the language and structure of CERCLA show that Congress intended to preserve longstanding protections afforded to shareholders that exert control over the activities of a corporation that owns or operates a hazardous waste disposal facility.

B. Applying The Principle "Expressio Unius Est Exclusio Alterius," The Text Of CERCLA Shows That Congress Did Not Intend To Abrogate The Common Law Rule of Limited Shareholder Liability.

The United States contends that the answer to the question presented by this case lies strictly within the text of CERCLA – without reference to the common law. The United States' argument goes as follows. CERCLA defines a corporation as a "person," 42 U.S.C. § 9601(21), and then imposes liability on any person that "owns or operates" a facility. 42 U.S.C. § 9607(a); *see* Pet. Br. at 18-19. CERCLA then defines the phrase "owner or operator" circularly, as any person "owning or operating [a] facility." 42 U.S.C. § 9601(20)(A)(ii). From this, the United States argues that liability attaches to any

person – including the shareholders of a corporation – if their activities fall within one of several broad dictionary definitions of the term "operator." Pet. Br. at 20-22. According to the United States, moreover, creating an extremely broad liability net by defining the term expansively is permissible as it furthers the statute's goal of promoting cleanup of hazardous waste disposal sites. *Id.* at 26.

By relying on this expansive definition of the term "operator," the United States ascribes to one word "a meaning so broad that it is inconsistent with its accompanying words, thus giving 'unintended breadth'" to CERCLA. *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (quoting *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961)). It is not surprising that CERCLA, like many other federal statutes, includes corporations as potentially liable "persons" under the act. As such, CERCLA establishes with relative clarity that a corporation that actually owns or directly operates a hazardous waste disposal facility can be held liable under the act. 42 U.S.C. §§ 9601(20)(A) & 9607(a). But this conclusion merely begs the question presented here: when shareholders choose to conduct business using the corporate form, and that corporation owns or operates a hazardous waste disposal facility, does CERCLA impose liability not only on the corporation, but also on *the shareholders* of the corporation if they exercise some degree of "control" over and "actively participate" in the affairs of the corporation? By using the single word "operator," did Congress intend to nullify the time-honored protections that the common law otherwise affords corporate shareholders, merely because the corporation owns or operates a hazardous waste disposal facility? On this question, the text of CERCLA provides a very different answer than that posited by the United States.

Congress did not employ the same definition in CERCLA for all owners or operators of facilities. Rather, § 9601(20)(A) defines the phrase "owner or operator" as follows:

> (i) in the case of a vessel, any person owning, operating, or chartering by demise such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, *or otherwise controlled activities at* such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(20)(A)(i)-(iii) (emphasis added). Subsection (iii) defines an "owner or operator" of a facility conveyed to a state or local government by means of foreclosure or otherwise to include not only those who actually "owned" or "operated" a facility, but also any person who "otherwise controlled activities at such facility." But subsection (ii) defines an "owner or operator" of all other facilities as *only* those persons "owning or operating" the facility. As such, Congress expressly made *both* "owners or operators" *and* those who "otherwise controlled activities" liable with respect to government-owned facilities. Congress excluded any such "control" group, however, from its definition of those who are liable as operators of other facilities, such as the facility at issue here.

This distinction cannot be ignored without violating the cardinal principle of statutory construction, "*expressio unius est*

exclusio alterius" – the inclusion of one is the exclusion of another. In other words, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion and exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted). That Congress made both actual owners or operators and those who "otherwise controlled activities" liable only for state-owned facilities "underscores [the courts'] duty to refrain from reading [that] phrase into the statute when Congress has left it out." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993). The Fifth Circuit aptly summarized the point as follows:

> Significantly, CERCLA does not define "owners" or "operators" as including the parent company of offending wholly-owned subsidiaries. Nor does the legislative history indicate that Congress intended to alter so substantially a basic tenet of corporation law.
>
> . . . .
>
> . . . . Congress is quite capable of creating statutes that hold shareholders or controlling entities liable for the acts of valid corporations. In fact, Congress adopted a "control" test in the next subsection of the statute. Under CERCLA, the term "owner or operator" is defined for facilities conveyed to state or local governments by bankruptcy, tax delinquency or abandonment, as "any person who owned, operated *or otherwise controlled* activities at such facility immediately" before conveyance. No such "control" test appears in subsection (ii), the subsection at issue in this case, and we will imply none.

Joslyn Mfg. Co. v. T.L. James & Co., 893 F.2d 80, 82-83 (5th Cir. 1990) (emphasis in original), *cert. denied*, 498 U.S. 1108 (1991). *Accord Cordova*, 113 F.3d at 579.

Those courts that have eschewed traditional common law principles in favor of a control test simply have failed to square their analysis with the "otherwise controlled activities" language found in subsection (iii) but not in subsection (ii). *E.g.*, *Lansford-Coaldale Joint Water Auth. v. Tonolli Corp.*, 4 F.3d 1209, 1221-22 & n.11 (3d Cir. 1993); *Jacksonville Elec. Auth. v. Bernuth Corp.*, 996 F.2d 1107, 1109-10 (11th Cir. 1993); *United States v. Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), *cert. denied*, 498 U.S. 1084 (1991). Indeed, when discussing the text of CERCLA, the First Circuit in *Kayser-Roth* deleted from its analysis any reference to subsection (iii). 910 F.2d at 27 n.7.

These courts have reasoned that in their view the text of CERCLA "provide[s] no reason why a parent corporation cannot be held liable as an operator under CERCLA." *Id.* at 26. This analysis has the rule backwards. Traditional common law rules apply *unless* Congress has spoken directly to the issue and congressional intent to nullify it is evident, not the other way around. *United States v. Texas*, 507 U.S. 529, 534 (1993); *Milwaukee v. Illinois*, 451 U.S. 304, 315 (1981); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

The United States touches briefly on this subject in its brief, but its analysis is unpersuasive. The United States initially reviews the amendments Congress has made to the definition of "owner or operator" in section 9601(20)(A)(iii), Pet. Br. at 26-28, but fails to mention that Congress has *always* imposed liability on those who "otherwise controlled activities" in subsection (iii), and has *never* imposed liability on this group for facilities that fall within the scope subsection (ii). This fact actually reinforces the conclusion that Congress has

purposefully excluded a "control" group from those liable for facilities covered by subsection (ii). In the end, the United States is forced to argue that Congress placed the "otherwise controlled activities" language in subsection (iii) merely "to make clear that the term 'owner or operator' includes persons who 'controlled activities' at an inactive facility." Pet. Br. at 28.

That cannot be the correct interpretation of this provision. The United States' proposed definition of "operator" clearly is broad enough to cover both persons who actually operate a facility as well as persons who "otherwise controlled activities at such a facility." Pet. Br. at 20-21. To construe the term "operator" in this manner renders the language "or otherwise controlled activities" in subsection (iii) entirely superfluous. The United States' interpretation also ignores the distinction Congress made in its definition of "owner or operator" in subsections 9601(20)(A)(ii) and (iii). Courts do not "construe one provision in a statute so as to suspend or supersede another provision. To avoid denying effect to a part of a statute, [courts should] accord 'significance and effect . . . to every word.'" *Rake v. Wade*, 508 U.S. 464, 471-72 (1993) (quoting *Washington Mkt. Co. v. Hoffman*, 101 U.S. 112, 115 (1879)). *Accord United States v. Fabe*, 508 U.S. 491, 504 n.6 (1993); *Moskal v. United States*, 498 U.S. 103, 109-10 (1990).

In sum, no principle of law is more fundamental than that of limited liability of corporate shareholders. If Congress intended to abrogate this rule in CERCLA's definition of "owner or operator," it surely would have done so with more clarity than one can discern in the statute. In fact, the text, structure, and legislative history of CERCLA evince a clear congressional intent to leave this common law rule intact with respect to facilities other than those conveyed to a state or local government by foreclosure or similar means.

III. THE UNITED STATES RELIES ON UNSUPPORTED AND ERRONEOUS ASSERTIONS ABOUT THE "TYPICAL" RELATIONSHIP BETWEEN A PARENT AND ITS SUBSIDIARY.

Both the United States and the district court rely upon unsupported – and wholly erroneous – assertions about the "typical" degree of control exercised over a corporation by its parent or controlling shareholder. Inherent in this reasoning is the assumption that a parent's normal "control" of its subsidiary is somehow wrongful and justifies a court in stretching a statute to impose liability on the entity exercising such control.

On the contrary, so long as the corporate formalities are observed, and the corporate form is not used to perpetrate a fraud, it is normal and proper for a parent or controlling shareholder to oversee its investment through careful supervision of the subsidiary's affairs. In so doing, the shareholder depends on the traditional rule of limited liability. As this Court has observed: "Limited liability is the rule not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital attracted." *Anderson v. Abbott*, 321 U.S. 349, 362 (1944). Indeed, "one of the primary purposes of the corporate form of business is to insulate shareholders from unlimited liability . . . ." *C M Corp. v. Oberer Dev. Co.*, 631 F.2d 536, 541 (7th Cir. 1980).

The United States argues that a parent corporation normally restricts itself to exercising "*general authority* over a wholly-owned subsidiary" and that a parent should decide only a subsidiary's "*general matters* of corporate governance put forward by the board." Pet. Br. at 43 (emphasis added). The United States then asserts that it is not "usual" or "typical" for a parent to go beyond such "general" supervision by placing its

own employees in executive positions at a subsidiary and that doing so should subject the parent to CERCLA liability:

> Thus, in the *usual* situation, the subsidiary's own executive officers, acting on behalf of the subsidiary, are responsible for managing the subsidiary and "operating" the subsidiary's facility. If the parent corporation, however, *departs from the typical practice* and employs its own agents as executive officers (or as board members performing the typical functions of an executive officer) to manage the subsidiary, then a court may conclude that the parent corporation is, in fact, "operating" the subsidiary's facility.

Pet. Br. at 44 (emphasis added). The district court employed a similar distinction.[5]

The United States cites neither support in the record nor precedent in the law for the notion that it is "typical" for a parent or controlling shareholder to refrain from direct involvement in the affairs of a subsidiary. In fact, the law is decidedly to the contrary. Numerous courts have recognized that parent companies necessarily control all important decision-making by their subsidiaries, and that such control does not lead to liability of the parent. *E.g.*, *Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997) ("Common management and ownership are ordinary aspects of a parent-

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[5] The district court held: "A parent's actual participation in and control over a subsidiary's functions and decision-making creates 'operator' liability under CERCLA; a parent's mere oversight of a subsidiary's business *in a manner appropriate and consistent with the investment relationship* between a parent and its wholly owned subsidiary does not." 777 F. Supp. at 573 (emphasis added).

subsidiary relationship."); *American Tel. & Tel. Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996) ("The circumstances relied upon to establish GBL's 'domination' over Keystone reflect no more than a normal parent-subsidiary relationship."); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1459-60 (2d Cir. 1995) (parent's control over subsidiary's leases, major capital expenditures, and other business affairs held to be "typical of a majority shareholder or parent corporation"); *Gibraltar Sav. v. LDBrinkman Corp.*, 860 F.2d 1275, 1287 (5th Cir. 1988), *cert. denied*, 490 U.S. 1091 (1989) (operating a subsidiary "in close concert with the interests of the owners" is "perfectly natural and proper and provides no basis for ignoring legal independence"); *Craig v. Lake Asbestos of Quebec, Ltd.*, 843 F.2d 145, 150 (3d Cir. 1988) ("It is assumed to be the norm that a parent will have 'not only . . . the potential to exercise control [over the subsidiary], but to exercise it to a substantial degree.") (quoting P. Blumberg, The Law of Corporate Groups: Tort, Contract, and Other Common Law Problems in the Substantive Law of Parent and Subsidiary Corporations § 10.02, at 187 (1987) (alterations in original)); *Topp v. CompAir Inc.*, 814 F.2d 830, 837 (1st Cir. 1987) ("[T]he fact that a parent corporation exercises the control which is necessarily incident to the full ownership of its subsidiary is insufficient, without more, to justify ignoring the separate corporate entities."); *Edwards Co. v. Monogram Indus., Inc.*, 730 F.2d 977, 986 (5th Cir. 1984) (en banc) ("Undoubtedly, Monotronics was ultimately controlled by Monogram. This will always be the case where a parent corporation has a wholly-owned subsidiary.").

The district court did not purport to find grounds sufficient to pierce the corporate veil between CPC and its subsidiary. Instead, the district court concluded that CERCLA authorized the creation of "a new, middle ground" on which a parent corporation could be found liable as an "operator" based on an ill-defined set of "factors." 777 F. Supp. at 573. These

"factors," as identified by the district court, consist of: "the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal." *Id.*[6] As the Sixth Circuit correctly pointed out, however, "these activities are not grounds traditionally relied upon as warranting the disregard of separate corporate existences." 113 F.3d at 580.

Parent corporations routinely participate in and direct those phases of a subsidiary's business identified by the district court, and it has never been thought improper for parents to do so. For example, as to the district court's first factor (participation in the subsidiary's board of directors), even the United States recognizes that "stock ownership . . . allows the parent to choose the subsidiary's board of directors and to vote on general matters of corporate governance put forward by the board." Pet. Br. at 43. The other "factors" relied on by the district court have come up frequently in the lower courts in contexts other than CERCLA and have not been found to be grounds for disregarding a subsidiary's corporate form.[7]

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[6] The district court's only other suggested guidelines were that "determining the origin and business function of the subsidiary in the context of the parent corporation's business may be helpful . . . ." Other evidence, the court observed, "may be less probative if it is simply indicative of the actions of a prudent investor, rather than an active operator . . . ." 777 F. Supp. at 573.

[7] *See, e.g., American Tel. & Tel. Co.*, 94 F.3d at 589 n.4, 591 (corporate form cannot be disregarded to exercise jurisdiction over parent, even where parent had participated in detailed management decisions such as spending money on anti-pollution equipment, subsidiary was included in parent's consolidated tax returns, and an employee of the parent attended all meetings of the subsidiary's board of directors); *Edwards Co.*, 730 F.2d at 979 (no

(continued...)

Moreover, because CERCLA imposes liability on both current and past operators of hazardous-waste facilities (see 42 U.S.C. § 9607(a)(1), (2)), the test advocated by the United States would encourage current operators of facilities to sue *their own former shareholders*, based on their alleged "control" over the offending corporation. This tactic may seem absurd because "the accepted rule is that the corporate veil will only be pierced to protect the interests of third parties; the separate corporate entity will not be disregarded to allow the corporation to escape its obligations." *Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739, 751 (7th Cir. 1989).[8] Nonetheless, this is precisely the

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[7] (...continued)
liability of parent even though all officers and directors of subsidiary were either officers or directors of parent, subsidiary did not have its own payroll or office space, and all bookkeeping was handled by parent); *Williams v. McAllister Bros. Inc.*, 534 F.2d 19, 21-22 (2d Cir. 1976) (no liability of parent even though key officers and directors of subsidiary were all employees of the parent, and the parent required that it be informed of and consent to major repairs to the subsidiary's tugboats); *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 837 F. Supp. 1128, 1134-35 (N.D. Ala. 1993) (no liability of corporate parents despite "their providing technology, research, testing, personnel, and facilities to Dow Corning; their control and election of Dow Corning's board of directors; [and] their management of Dow Corning's financial affairs;" and observing that "the sharing of directors is a practice frequently found in parent and subsidiary relationships"); *Akzona Inc. v. E.I. du Pont de Nemours & Co.*, 607 F. Supp. 227, 237-40 (D. Del. 1984) (corporate form cannot be disregarded to exercise jurisdiction over parent, even where parent was 100% owner of subsidiary, there were common directors, and parent required that it approve significant expenditures).

[8] *Accord McCarthy v. Azure*, 22 F.3d 351, 362-63 (1st Cir. 1994) ("the [alter-ego] doctrine can be invoked 'only where equity (continued...)

theory that the plaintiffs are pursuing in the *Pinal Creek* litigation. Despite the common law rule against a corporation suing its own shareholders, plaintiffs' theory that CERCLA's use of the word "operator" authorizes just such a claim so far has survived a motion to dismiss.

The Court should stop this derogation of longstanding common law protections afforded to corporate shareholders and hold, as the Fifth and Sixth Circuits have held, that "[i]f Congress wanted to extend [CERCLA] liability to parent corporations" – and if it wanted to allow corporations to pierce their own veils and impose CERCLA liability on their own shareholders – "it could have done so, and it remains free to do so." *Cordova*, 113 F.3d at 579-80 (quoting *Joslyn Mfg.*, 893 F.2d at 83). But Congress has not done so, and neither should the federal courts. "[A]ny bold rewriting of corporation law in this area is best left to Congress." *Joslyn Mfg.*, 893 F.2d at 83.

IV. THE UNITED STATES CONFUSES DIRECT AND DERIVATIVE LIABILITY, AND USES EVIDENCE OF ONE TO SUPPORT THE OTHER

Throughout its brief, the United States intertwines and confuses two concepts that are central to this case: a parent's *derivative* liability (if any) for the actions of its subsidiary and a parent's *direct* liability for its own actions. When the facility is owned and operated by the subsidiary, and the parent is alleged to be liable simply because it participated in and

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[8] (...continued)
requires the action to assist a third party'"); 1 William M. Fletcher, Fletcher Cyclopedia of the Law of Private Corporations § 41.10, at 615, 634 n.13 (perm. ed. rev. vol. 1990) (the corporate form may be disregarded only where equity requires doing so to assist a third party).

controlled the business affairs of the subsidiary, any liability of the parent is completely derivative. For example, the United States poses the question presented strictly in terms of derivative liability: "Whether a corporation that . . . exercised control over . . . the operations of a subsidiary may be held liable . . . as an operator of the subsidiary's facility." Pet. Br. at I.

At times, however, the United States drops its derivative theory and argues instead for direct liability: "CERCLA subjects entities to *direct liability*, without regard to corporate form, based on the entity's *own* actions in operating the facility." Pet. Br. at 17 (emphasis in original). *See also* Pet. Br. at 34. The United States switches back and forth between the two theories and finally settles on a hybrid: "When a parent corporation . . . actually participates in the day-to-day operation *of a subsidiary and its facility*, CERCLA dictates that the corporation should be responsible . . . for the costs of cleanup." Pet. Br. at 41 (emphasis added).

Amici suggest that the two concepts are distinct and should be analyzed differently. If a parent corporation is alleged to be liable because of claimed control over the subsidiary's business affairs and decision-making, the theory is derivative. ARCO and Newmont support the analysis of the Sixth Circuit and the position of CPC that under CERCLA, a parent is derivatively liable for its subsidiary's operation of a facility only when there exist grounds for piercing the corporate veil under state law. *See Cordova*, 113 F.3d at 580. If a parent corporation is alleged to be liable because of *its own* conduct, the theory is direct liability. The Sixth Circuit observed that direct liability conceivably might be found where a parent "independently operates the facility in the stead of its subsidiary." *Id.* at 579. The task facing the court under such a theory is to determine whether the evidence shows independent

operation of the facility by the parent itself – not by the subsidiary.

The district court did not purport to find grounds for piercing the corporate veil between CPC and its subsidiary, and consequently there is no basis for imposing derivative liability on CPC. As we show in the next point, the United States also has failed to identify evidence that would support a conclusion that CPC should be directly liable for operating the facility itself.

A. The United States Does Not Identify Sufficient Evidence Of Actual Operation Of The Facility By CPC To Prove Direct Liability.

Despite the efforts of the United States to marshal the evidence (Pet. Br. at 45-47), it is apparent that the record falls well short of demonstrating that CPC itself actually operated the facility. According to the United States, CPC "placed its own high level officers in key management positions of its subsidiary" and "made loans to its subsidiary . . . and assumed several of the subsidiary's loans." Pet. Br. at 45, 47. But these facts pertain solely to the parent's general oversight of the subsidiary's business and are relevant, if at all, only to a theory of derivative liability.

When it comes to actual involvement at the facility, petitioner cites only two items. *First*, the United States points to decisions made by individuals who were officers of both the subsidiary and CPC. Pet. Br. at 45-46. Just like the plaintiffs in *Pinal* Creek, the United States automatically attributes to the parent the actions of any person who was an officer of both the subsidiary and the parent. In so doing, the United States effectively ignores the corporate existence of the subsidiary – its argument assumes that the subsidiary's corporate veil is to be pierced, merely because employees of the subsidiary also

hold positions with the parent. But the existence of such dual employees is insufficient under state law to pierce the veil. See *Edwards Co.*, 730 F.2d at 979, and other cases cited at *supra* n.7. Thus, the United States' argument again depends on disregarding fundamental principles of common law. However, in enacting CERCLA Congress demonstrated no intent to alter basic principles of state corporation law, but instead evinced a clear intent to adopt and incorporate state common law principles. *See supra* n.3. Thus, when the subsidiary is the owner of a facility, and its employees make day-to-day decisions about operations at the facility, the parent cannot be saddled with liability as an operator merely by ignoring the separate existence of the subsidiary and attributing to the parent all actions of dual employees.[9]

Second, the United States points to involvement in environmental issues of CPC's environmental affairs director, G.R.D. Williams. Even accepting the best case that the United States can make for Williams' involvement, it appears that he was involved only in particular decisions from time to time. There is no claim that he exercised either day-to-day operational control at the facility or that he set and enforced long-term policy for operations at the facility.

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[9] Dual officers and directors are "very common in the realm of business." *Western Pac. R.R. Corp. v. Western Pac. R. Co.*, 197 F.2d 994, 1000 (9th Cir. 1951), *cert. denied*, 346 U.S. 910 (1953). Persons who hold such dual positions are not liable to either corporation as a result of such duality unless they "favor the interests of one corporation while sacrificing or betraying those of the other." *Id.* Thus, state common law recognizes no reason why dual officers and directors cannot faithfully discharge their fiduciary duties *to the subsidiary*, while retaining positions with the parent. Absent a breach of fiduciary duty, a dual employee's actions on behalf of the subsidiary must be attributed solely to the subsidiary.

B. Direct Liability Of A Parent Must Be Based On A Showing That The Parent Independently Operated The Facility.

Amici submit that the evidence cited by the United States is insufficient to show that CPC – and not its subsidiary – independently operated the facility. As shown in this brief, parent corporations typically are closely involved in the operations of their subsidiaries. As shown above (*supra* n.3), it is common for a single individual to hold a position with both companies. Because parent corporations are entitled to create such dual positions without losing the protection of the subsidiary's corporate shield, amici submit that acts of dual employees cannot be attributed automatically to the parent for purposes of attempting to establish the liability of a parent. *See Lusk v. Foxmeyer Health Corp.*, 129 F.3d 773, 778 (5th Cir. 1997) ("[M]ere existence of common management and ownership are not sufficient to justify treating a parent corporation and its subsidiary as a single employer.").

Similarly, a parent's oversight of its investment in a subsidiary's business naturally leads many parent corporations to provide technical advice and assistance to their subsidiaries, to send employees to inspect and report on operations at a facility, or even to become involved in particular decisions at a facility. An example is Williams' involvement in particular environmental matters. Pet. Br. at 46. Amici submit that these discrete, episodic kinds of involvement at a facility are insufficient to establish that a parent actually has become the "operator" of a facility.

As the Sixth Circuit acknowledged, a parent might become liable as an operator of a facility owned by a subsidiary if the parent "independently operate[s] the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate[s] the facility alongside its subsidiary." 113 F.3d at

579. In order to meet this test, the evidence must be unequivocal that the acts relied upon truly were acts of the parent. An act of a person employed by both the parent and the subsidiary cannot be attributed to the parent unless there are grounds for piercing the corporate veil. In addition, the evidence must be sufficient for the finder of fact to conclude that the parent itself operated the facility, independently of the subsidiary, during a period of hazardous waste disposal. Evidence that employees of the parent exercised some measure of influence or control over the facility, provided services or assistance, made visits to the facility, or decided certain issues pertaining the facility are insufficient to prove that the parent was an operator of the facility.

This standard for measuring direct liability prevents imposition of operator liability merely by attributing to a parent conduct that under common law must be attributed to a subsidiary. Respect for the corporate veil and the traditional rule of limited shareholder liability demands that liability of a parent be based on either: (1) facts sufficient to justify piercing the corporate veil; or (2) facts demonstrating that the parent itself has engaged in the conduct that serves as the basis for liability. A parent is entitled to own a subsidiary that operates a facility, and to exercise "normal incidents of stock ownership, such as the right to select directors and set general policies," *Lusk*, 129 F.3d at 778, without thereby becoming liable under CERCLA as an operator of the facility.

Amici submit that both the derivative and the direct theories of liability are presented by this appeal, and that both should be addressed. If the Court were to hold only that a parent cannot be derivatively liable as an operator for the acts of its subsidiary unless there are grounds for piercing the corporate veil under state law, plaintiffs simply would switch to a theory of direct liability. Plaintiffs would assert, as they do here and in *Pinal Creek*, that acts of the subsidiary should be

attributed to the parent and that the parent should be "directly" liable for those acts.

CONCLUSION

Nothing in CERCLA'S text or legislative history suggests that Congress intended to substitute the relatively bright line test provided by the traditional doctrine of piercing the corporate veil with an amorphous control test. This Court should reject the control test because it is leading to absurd and unfair results, as demonstrated by the *Pinal Creek* litigation, where corporations are attempting to impose operator liability on their former shareholders in derogation of the common law principle that bars such actions. As the Sixth Circuit appropriately held, parent corporations are not liable as operators for the conduct of their subsidiaries unless there exist grounds under state law for piercing the corporate veil, or the parent corporation independently operates a facility. Because the United States did not meet its burden under either theory, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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